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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 01 2009
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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a postdoctoral research associate at Michigan State University. He is now an assistant professor of dairy nutrition at the University of Idaho. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits materials relating to a new job offer.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not raise this issue. We will, therefore,

review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on April 13, 2007. In a statement accompanying the initial filing, the petitioner stated:

> I have directed my research to the interrelationships between nutrition and disease, and have recently completed my doctoral studies in Animal Science at the University of Connecticut. My long-term research goal is to develop new methods and generate new data concerning the interactions between nutrient metabolism and health, and thus I have started utilizing emerging strategies to study the molecular components of macronutrient metabolism, which will hopefully lead to new information that can improve overall health.
>
> . . . [A]fter completing my Ph.D. I accepted a position as a research associate, in the esteemed Meadow Brook Laboratory, located in the Department of Large Animal Clinical Sciences at Michigan State University. . . .
>
> My graduate research work has focused on 1) studying associations between negative energy balance, lipid-energy metabolites, lipid-soluble vitamins, and pathogen prevalence and new intramammary infection occurrences during the periparturient period of dairy cows, and to evaluate the potential effect of breed on these associations, 2) improving milk yield and quality (milk protein content) of high producing dairy cows through feeding diets in which differently processed grains were utilized, and 3) studying feeding behaviors of replacement nulliparous cows in response to different feeding diets.

Several witness letters accompanied the petition; we will discuss examples of these letters here. All but two of the letters are from faculty members of the University of Connecticut. [redacted] stated:

> Mastitis is a disease of the mammary gland and leads to significant economic losses annually both nationally and internationally. It is a significant problem in the dairy industry that must be better understood. As part of his work, he undertook a tremendous number of very challenging biochemical analyses on a large group of animals. The tenacity with which he pursued his dissertation research was impressive and led to significant intellectual growth that has helped to establish him as an expert in the relationship between nutrition and mastitis development in dairy cattle. . . .
>
> I believe that he is an emerging scholar of international significance in the field of dairy cattle nutrition. At the same time, it is critical to note that he is also very knowledgeable in the discipline of statistical design and analysis of animal research. . . . Too often, scientists lack the statistical strength needed to truly advance the field; this is not the case with [the petitioner] and is one of the principal reasons that I enthusiastically endorse his application.

[redacted] stated:

> I was [the petitioner's] major advisor for his Ph.D. degree in the Department of Animal Science at the University of Connecticut. . . . One significant result of his research is the determination that the nutritional protein status of dairy cows affects immune status and risk of mastitis in the periparturient period. [The petitioner's] finding is, therefore, very important for animal health and productivity and can be the basis for nutritional modifications during this metabolically challenging period in the lactation cycle of the dairy cow.

[redacted] stated that the petitioner "has published his groundbreaking work on the functional importance of energy and retinol binding protein on mastitis in the transition cow. . . . Thus, [the petitioner's] findings may be utilized by pharmaceutical companies in development of new treatments for prevention of mastitis."

Outside of the University of Connecticut, Iowa State University Associate stated:

> I have been acquainted with [the petitioner] since he came to the US and U Conn (2001) but [we] have really become scientific colleagues and friends the past 3-4 years through our communications and interactions at professional and scientific meetings. . . . [The petitioner] has an excellent command of nutrition in many species (both basic and applied), coupled to great foundations in immunology, and a diverse deep background in common sense management practices that tie these sciences together. What sets [the petitioner] apart from many others is that he knows and integrates all these areas well.

[redacted] of the University of Idaho stated:

> I became acquainted with [the petitioner] during the National Meeting of [the] American Dairy Science Association several years ago. . . . [The petitioner's] dedication to research became apparent to me when he presented his research findings from the University of Connecticut. His presentations were well received by the audience and showed a great deal of careful experimental designs, scientific knowledge and importance to the field of dairy science.

Numerous witnesses offered general praise for the petitioner's research abilities and dedication.

On April 9, 2008, the director issued a request for evidence, instructing the petitioner to submit evidence of "a past record of specific prior achievement that justifies projections of future benefit to the national interest." The director also requested evidence of the petitioner's influence on his field, such as copies of other researchers' articles that contain citations of the petitioner's published work.

By the time the petitioner responded to the request for evidence, he had left the University of Michigan and begun working at the University of Idaho. In a statement included with that response, the petitioner

listed his various accomplishments, but did not establish that these achievements distinguish him from others in the field. The petitioner asserted that he had "been regularly assigned by the senior/section editors of the Journal of Dairy Science (JDS)" to review manuscripts submitted for publication in that journal. The record contains copies of correspondence, showing that the *JDS* Section Editor was Dr. [redacted] who was, at the same time, the petitioner's supervisor at the University of Michigan. The petitioner's participation in peer review at the behest of his own supervisor does not establish the high standing in the field that the petitioner claims.

The petitioner observed that the *JDS* "is the top-ranked dairy research journal in the world . . . with an impact factor of 2.284" (the petitioner's emphasis). The impact factor is calculated from citations of individual articles in a given journal, but the petitioner did not indicate that his own articles have been cited at significant rates.

The petitioner documented his authorship of articles and his participation at numerous scientific conferences, but prolific output does not demonstrate or ensure significant impact or influence in the field. The materials do not show how the petitioner's work has affected dairy science or other aspects of animal research. Such influence is not self-evident from the material's very existence.

The director denied the petition on September 10, 2008, stating that the petitioner failed to demonstrate significant influence within his field. On appeal, the petitioner states that he "was offered a position, employed as a full time tenure-track Assistant Professor of Dairy Nutrition . . . at the University of Idaho." The petitioner discusses the university and his position there, and asserts that his teaching and research at the university will benefit the United States. Letters from University of Idaho faculty members provide more information about the appointment.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). At the time he filed the petition, the petitioner was a postdoctoral research associate at Michigan State University; the record contains relatively little information about his activities there. The tenure-track job offer from the University of Idaho is dated September 8, 2008, nearly a year and a half after the petition's April 2007 filing date. Even if the petitioner had shown that this job offer makes him eligible for the waiver, which the petitioner has not done, we cannot find that it retroactively qualifies him under a petition filed long before the job offer was made.

We note that Form I-140 includes the question: "Has any immigrant visa petition ever been filed by or on behalf of this person?" The petitioner originally answered "Yes," then obscured that answer with correction fluid and answered "No." USCIS records show that a member of the petitioner's family filed a Form I-130 immediate relative petition (receipt number EAC 06 090 50135) on the petitioner's behalf in February 2006. The Vermont Service Center approved the petition in June 2006. Thus, another immigrant visa petition had been not only filed, but approved, before the petitioner filed the present Form I-140 petition on his own behalf in April 2007. So long as the immediate relative petition remains valid, another avenue of immigration remains open to the petitioner.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.